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No. 96-1885

In the Supreme Court of the United States

OCTOBER TERM, 1996

FRILLZ, INC., PETITIONER

v.

AIDA ALVAREZ, ADMINISTRATOR OF SMALL BUSINESS ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Small Business Administration (SBA) properly refused to authorize disbursement of an SBA-guaranteed loan to petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 104 F.3d 515. The opinion of the district court (Pet. App. 12-21) is reported at 925 F. Supp. 83.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1997. A petition for rehearing was denied on February 20, 1997. Pet. App. 10-11. The petition for a writ of certiorari was filed on May 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In February 1993, the Small Business Administration (SBA) agreed to guarantee 80% of a $612,000 loan to be made by Eastern Bank (the Lender) to petitioner. Pet. App. 2, 13. The SBA conditionally authorized the loan guaranty by signing (through Gordon J. Ryan, the Chief of the agency's Finance Division) an "Authorization and Loan Agreement" (Agreement), which petitioner also signed. *Id.* at 5, 13. Actual disbursement of the loan by the Lender was to occur at a later date, within a time frame prescribed by the Agreement. *Id.* at 13. The Agreement provided that continued authorization of the SBA's loan guaranty was conditioned upon receipt by the Lender of "evidence satisfactory to it in its sole discretion, that there has been no unremedied adverse change since the date of the Application * * * in the financial or any other conditions of [petitioner], which would warrant withholding or not making any such disbursement." *Id.* at 2.

After the SBA conditionally authorized the loan guaranty, the agency granted several extensions of the date of the first disbursement of the loan. Pet. App. 13. During that time, petitioner's business deteriorated and the loan funds were not disbursed. *Ibid.* Petitioner's business subsequently improved, and the Lender wrote the SBA that the adverse change in petitioner's financial condition had been remedied to the Lender's satisfaction. *Id.* at 2, 13-14. The SBA was unconvinced, however, and continued to refuse authorization of the disbursement. *Id.* at 14. The loan was never disbursed.

2. Petitioner filed suit, maintaining that the SBA was in violation of that portion of the Agreement

which stated that the determination whether petitioner suffered an "unremedied adverse change" was to be in the Lender's "sole discretion." Pet. App. 2-3, 13. Under petitioner's theory, the SBA should have approved disbursement of the loan, despite its concerns about the petitioner's weak financial condition, upon the Lender's conclusion that petitioner had remedied the previous adverse change in its business. *Id.* at 3, 13-14.

The district court entered summary judgment in favor of the SBA on the basis of 15 U.S.C. 636(a)(6), which provides that the SBA's authority to ensure that the loans guaranteed by the agency shall "be of such sound value or so secured as reasonably to assure repayment," must "be exercised solely by the Administration and shall not be delegated to other than Administration personnel." Pet. App. 4 n.1, 14-15, 20-21. In light of that statutory language, the district court concluded that the SBA could not delegate authority to determine the soundness of a loan to outside financial institutions such as the Lender. *Id.* at 14. The court rejected petitioner's contention that Congress had effectively repealed the statutory restriction on the delegation of authority in the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1910, 95 Stat. 778. See Pet. App. 16-17.

3. The court of appeals affirmed without relying on the statutory prohibition on delegation or resolving the issue of whether it had been repealed. Pet. App. 3-4 & n.1. Instead, the court held that any delegation of authority that may have been embodied in the Agreement was independently precluded by SBA regulations, which prohibited the Chief of the SBA's Finance Division from redelegating his authority to approve or reject loans, to extend disbursement

periods, and to cancel, reinstate, and modify loan authorizations. See 13 C.F.R. 101.3-2, Pt. I, §§ A(1)(b), B, and Pt. XI, § A(1) (1993); Pet. App. 5, 24-25. The court specifically rejected petitioner's attempt to avoid application of those regulations by characterizing as an ordinary "loan term" that portion of the Agreement that gave discretion to the Lender to determine any unremedied adverse changes. The court found that "[g]ranting the Lender the right to determine the soundness of a loan guaranty constitutes a significant relinquishment of power." *Id.* at 6.*

Accordingly, the court concluded that "because the Chief of the Finance Division had no authority to delegate to the Lender the determination of whether [petitioner] had suffered an unremedied adverse change in its financial condition, the government cannot be bound by that stipulation in the loan guaranty authorization." Pet. App. 6.

ARGUMENT

Petitioner argues at length (Pet. 6-11) that this Court should decide whether Congress in 1985 repealed that portion of 15 U.S.C. 636(a)(6) that provides that the agency's authority "shall be exercised solely by the Administration and shall not be delegated to other than Administration personnel." The statute's

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* The court of appeals also refused to permit petitioner to pursue its alternative claim that the SBA was equitably estopped from withholding its approval of the loan disbursement, observing that the doctrine of equitable estoppel generally has no application to the federal government, and that there was "absolutely no evidence" in this case of any affirmative misconduct by the SBA which might even "arguably" give rise to such a claim. Pet. App. 6-7.

purported repeal, however, was not a basis for the court of appeals' decision. That decision rested entirely on the prohibition against redelegation independently contained in the agency's regulations. Moreover, the court of appeals' conclusion that SBA regulations precluded the loan disbursement sought by petitioner is correct and does not conflict with any decision of this Court or any other court of appeals or district court. Accordingly, further review is not warranted.

1. SBA regulations in effect at the time of petitioner's Agreement provided that the agency's Finance Division Chief was authorized to approve or reject loans up to $750,000, 13 C.F.R. 101.3-2, Pt. I, § A(1)(b)(7) (1993), as well as to "cancel, reinstate, modify, and amend authorizations," *id.* § B(2)(g), and to "extend disbursement periods * * * without limitations." *Id.* § B(3)(a)(7). See Pet. App. 24-25. The regulations made clear, however, that those delegations of authority to the Finance Chief could "not be redelegated." 13 C.F.R. 101.3-2, Pt. XI, § A(1). The court of appeals properly relied on the unambiguous terms of the agency's regulations to conclude that the Finance Chief was without authority to vest the Lender with the sole discretion to determine when to disburse an SBA-guaranteed loan.

Petitioner contends that "[t]he adverse change clause of the Agreement does not constitute a delegation of the authority to 'approve' an SBA loan, and therefore does not exceed the [Finance] Chief's authority." Pet. 12. On petitioner's reading, however, that clause purported to delegate to non-SBA personnel the authority to ascertain whether there had been a change in the conditions upon which SBA decided to "approve" the loan guarantee. The court of

appeals therefore correctly perceived that, so read, the "adverse change" clause effectively relinquished the SBA's authority over the loan approval process. See Pet. App. 6. And even if the adverse change determinations under the Agreement were not an integral part of the loan approval process, the grant of sole discretion to the Lender in that regard would plainly interfere with the Finance Chief's non-delegable power to "cancel, reinstate, modify, and amend authorizations." See 13 C.F.R. 101.3-2, Pt. I, § B(2)(g). As the court of appeals observed (Pet. App. 6), petitioner cannot circumvent the agency's non-delegation regulations by simply attaching a different label to the relevant contractual provision.

2. Petitioner also contends (Pet. 12) that the Agreement's inclusion of the typed name of the Acting Administrator, above the signature of the SBA's Chief of the Finance Division, demonstrates that the Chief "was acting under the apparent authority of the Acting Administrator," and that therefore the Chief's grant of discretion to the Lender was not *ultra vires*. Because petitioner first set forth this theory fully in its petition for rehearing, and gave this argument only "a passing mention in a footnote to [its] reply brief," the court of appeals deemed the argument to have been waived. Pet. App. 10-11 (order denying rehearing). The appeals court's waiver determination is in accord with its own decisions, see *Kale* v. *Combined Insurance Co.*, 924 F.2d 1161, 1169 (1st Cir.) (rejecting party's attempt to raise new issue for first time on petition for rehearing), cert. denied, 502 U.S. 816 (1991); *Sandstrom* v. *ChemLawn Corp.*, 904 F.2d 83, 87 (1st Cir. 1990) (holding that parties cannot raise new theories for the first time in a reply brief), as well as those of other circuits that have declined

to consider legal theories which parties had failed to preserve in their principal briefs, and does not warrant further review by this Court. See *Pfaff* v. *United States Dep't of Housing and Urban Dev.*, 88 F.3d 739, 750 n.7 (9th Cir. 1996) ("issues unsupported by argument are deemed abandoned" unless "manifest injustice" would result); *United States* v. *Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam) (declining to consider argument mentioned in brief without any explication).

In any event, petitioner's contention that the Acting Administrator's typewritten name on the signature block of the Agreement is an "endorsement" of the Agreement which gave the Chief apparent authority to ignore the regulatory prohibition against delegation (Pet. 12) is meritless. It is well settled that persons entering into arrangements with the federal government assume "the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947). See *United States* v. *Beebe*, 180 U.S. 343, 351-355 (1901); *Stone* v. *Bank of Commerce*, 174 U.S. 412 (1899). Petitioner has alleged no actions on the part of the Acting Administrator that should have led it to conclude that the Acting Administrator knew about, let alone consented to, the purported delegation of authority in the Agreement. Standing alone, the presence of the typewritten name of the Acting Administrator over the Finance Chief's signature on the Agreement does not constitute a reasonable basis on which petitioner could have concluded that

the Acting Administrator approved a delegation of authority inconsistent with the agency's formally promulgated regulations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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